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**From:** Croxton, David [Croxton.David@epa.gov]  
**Sent:** 1/5/2021 11:57:38 PM  
**To:** Opalski, Dan [Opalski.Dan@epa.gov]  
**Subject:** RE: Request to Reject CoE's NWP Revisions

Not surprising. Thanks.

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**From:** Opalski, Dan <Opalski.Dan@epa.gov>  
**Sent:** Tuesday, January 5, 2021 3:52 PM  
**To:** Croxton, David <Croxton.David@epa.gov>  
**Subject:** RE: Request to Reject CoE's NWP Revisions

I never heard more about that call one way or another, unfortunately.

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**From:** Croxton, David <Croxton.David@epa.gov>  
**Sent:** Tuesday, January 5, 2021 3:16 PM  
**To:** Opalski, Dan <Opalski.Dan@epa.gov>  
**Subject:** RE: Request to Reject CoE's NWP Revisions

It appears the only thing that went to OMB from EPA was Anna's redline strikeout of the Corp's decision document. I can send if you like, but not much substantive there. Do you know if Anna had the 12/30 6am PT NWP policy conference call?

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**From:** Opalski, Dan <Opalski.Dan@epa.gov>  
**Sent:** Tuesday, January 5, 2021 2:03 PM  
**To:** Croxton, David <Croxton.David@epa.gov>  
**Cc:** Grandinetti, Cami <Grandinetti.Cami@epa.gov>  
**Subject:** RE: Request to Reject CoE's NWP Revisions

Thanks, Dave. Did we ever see/hear what OW may have sent to OMB on behalf of EPA?

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**From:** Croxton, David <Croxton.David@epa.gov>  
**Sent:** Tuesday, January 5, 2021 8:06 AM  
**To:** Grandinetti, Cami <Grandinetti.Cami@epa.gov>; Opalski, Dan <Opalski.Dan@epa.gov>  
**Subject:** FW: Request to Reject CoE's NWP Revisions

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**From:** Baca, Andrew <Baca.Andrew@epa.gov>  
**Sent:** Tuesday, January 5, 2021 7:49 AM  
**To:** Croxton, David <Croxton.David@epa.gov>  
**Cc:** Fiedorczyk, Bryan <Fiedorczyk.Bryan@epa.gov>  
**Subject:** FYI

<https://insideepa.com/daily-news/states-wetlands-bankers-ask-omb-reject-army-corps-nwp-revisions>

# States, Wetlands Bankers Ask OMB To Reject Army Corps' NWP Revisions

January 4, 2021

State wetlands officials and ecological mitigation bankers are urging the White House Office of Management and Budget (OMB) to reject an Army Corps of Engineers final rule that would overhaul federal dredge-and-fill general permits, including a controversial plan to eliminate a 300-linear-foot limit for losses of stream beds.

In recent meetings with OMB and Corps officials, stakeholders have argued that the pending regulation is flawed for many reasons, including that the plan is based on a misinterpretation of current science.

The Corps in September proposed a host of changes for its nationwide permit (NWP) program including the elimination of the 300-linear-foot limit for losses of stream bed for several permits, taking comment through Nov. 16. The administration then sent the final version of the rule for OMB review on Dec. 12. OMB review typically takes 90 days but can be longer or shorter, and the Corps aims to publish the regulation in January.

As part of the pre-publication review process, representatives of the Association of State Wetlands Managers (ASWM), the Ecological Restoration Business Association (ERBA) and The Earth Partners (TEP), a mitigation banking company operating primarily in Texas, have met with White House officials in recent weeks to reiterate concerns raised in written comments to the Corps about its plan, according to documents on OMB's website.

ERBA met with OMB officials Dec. 21, TEP met Dec. 22 and ASWM met Dec. 23. EarthBalance, another mitigation banking company, met with OMB Dec. 29, and financial advisor firm Eco-Capital Advisors was slated to meet with White House officials Jan. 4.

A 2017 Corps report recommended changes to nine NWPs associated with domestic energy production to help achieve the goals of President Donald Trump's executive order promoting energy independence, but the Corps is proposing to eliminate the stream bed limit in all the places such a limit occurs, not just NWPs 21, 39, 50, 51 and 52, as discussed in the report.

The Corps says it believes that adding a compensatory mitigation requirement for losses of greater than 1/10-acre of stream bed can be equally effective in minimizing losses of stream bed under the NWP authorization process.

Additionally, the Corps says quantifying losses of stream bed in acres to count towards the 1/2-acre limit authorized by NWPs most accurately represents the amount of stream bed lost as a result of filling or extraction, and the subsequent functions that are expected to be lost.

Using linear feet to quantify stream impacts and stream compensatory mitigation credits does not take into account the scale of the stream reach being impacted by an authorized activity or restored for compensatory mitigation, or act as an effective surrogate for the amount of stream functions performed within that stream reach, the Corps says, explaining that it is drawing on information in the scientific literature.

But ASWM and other groups representing state regulators said in written comments on the proposal that the change could lead to thousands of linear feet of fill or wetland loss, and could potentially fragment watersheds or cause total loss of streams. Additionally, shifting from the linear-foot threshold to the proposed acreage threshold would introduce uncertainty and costs in some longstanding state mitigation programs, which use linear feet for mitigation calculations, they said.

ASWM, in particular, takes issue with the Corps' reference to research by Doyle et al. (2015) and Lave (2014), noting that the authors of this research have said the Corps' interpretation of their research is inaccurate and does not reflect either their science or common findings on this topic or the scientific literature on aquatic resources.

Martin Doyle, a professor at Duke University, and Rebecca Lave, a professor at Indiana University, told the Corps in written comments, "To put it more precisely and bluntly, our research does not support the use of stream bed area as being a superior or preferred metric for compensatory stream mitigation, nor does it offer a scientific rationale for replacing 300 LF with a 0.5-acre limit for stream impacts."

## 'Notable Regression'

ERBA said in its comments that elimination of 300 linear feet "as a threshold for scrutiny of stream bed impacts would represent a notable regression for the NWP program and stream restoration policy."

The wetlands banking group says it shares the Corps' concern about out-of-kind mitigation but counters that the NWP program "is not the appropriate or necessary vehicle to abruptly institute change in philosophy on stream restoration."

"While some of the Corps' presented rationale is well-intentioned, the goal of incentivizing large scale river restoration projects is more complex than a shift to an area based numeric limit in the NWPs and such goal should not be achieved at the detriment of millions of headwater stream resources," ERBA says.

In the regulatory context, permit data and studies show that the vast majority of permitted stream impacts are on lower-order, often headwater, streams because development is deterred from impacting larger stream or river features by multiple factors, ERBA says. Thus, within the 404 program, the majority of stream mitigation offsets are needed to service lower-order stream impacts, which science and restoration practice indicate are best measured by linear feet, the association says.

"Consequently, a sudden change in this fundamental metric will create regulatory and economic uncertainty across our industry," ERBA says, arguing that shifting from linear feet to acres will directly affect existing credit inventories and require extensive negotiations between bankers and Corps districts in order to convert credits from linear feet to acres. Of further concern, it is reasonable to expect that credit sales would have to cease during these negotiations, affecting Corps' permitting decisions, the ability for applicants to utilize mitigation banks and bankers' revenue, and will significantly lower future demand for most stream mitigation banks, ERBA says. Beyond these industry market concerns, ERBA says current science does not support the proposal. "To the contrary, impact data and science indicate that replacement of the 300 LF numeric limit with a 1/10th acre mitigation threshold will result in widespread and unmitigated impacts to small order streams that provide critical ecological functions."

While an individual impact to a smaller stream may arguably cause no more than a minimal adverse environmental effect, when considered cumulatively, it could lead to a death by a thousand cuts scenario, ERBA says.

ERBA notes that the Corps and EPA are currently collaborating on a peer-reviewed study analyzing the environmental and policy consequences of stream restoration metrics.

"We believe this study would appropriately inform future changes to the NWPs. Since the current NWPs do not expire until 2022, it seems prudent to wait for the study's results before proceeding with the current reissuance effort," ERBA says.

### **Litigation Uncertainty**

TEP, in its written comments on the Corps' proposal, says modifying the limit on losses of stream bed and removing the preconstruction notification (PCN) requirement for mechanized land clearing under NWP 12 lacks proper justification and will likely result in several NWPs authorizing activities that have significantly more than minimal adverse environment effects.

"As a result, multiple NWPs will likely be subject to litigation, as recently occurred with NWP 12, creating uncertainty and delays for the many industries that rely on the NWP program," TEP says.

If the CWA section 404 regulatory program "primarily regulated impacts to larger streams, an area-based metric may be more defensible, as such streams are more likely to have well-established floodplains, sloughs, backwater lakes, etc.," TEP says. However, headwater streams are fundamentally linear features in their hydrogeomorphic characteristics, and as stream restoration science and implementation have evolved over the past few decades, the linear foot has become the most established metric for measuring and capturing the linear nature of ecological functions and services provided by headwater streams, the company says. -- *Lara*

*Beaven* ([lbeaven@iwonews.com](mailto:lbeaven@iwonews.com))

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